

# **Unfair Settlement Practice Acts: Should Legislators Expressly Create or Should Courts Imply a Private Cause of Action for Third Parties?**

## **I. INTRODUCTION**

One bright, spring day John drove to his neighborhood carryout as he customarily did every week. He was driving with ordinary care when James sped through an intersection and violently rear-ended John's car. As a result of the accident, John suffered a severe head-and-neck injury, a broken knee cap, and various cuts and bruises. Due to the severity of his injuries, he can never resume employment as a truck driver.

During negotiations between John and James' insurance company ("the insurer"), the insurer's agent assured John that he would be compensated for his injuries. The agent, however, refused to agree to John's settlement demand and made no attempt to offer a reasonable settlement figure. The agent refused to pay John's medical bills and his claim for property damage prior to complete settlement or court adjudication. John retained an attorney to negotiate with the agent, but the attorney was unable to settle the claim.

John and his attorney attempted to negotiate with the insurer for nearly two years before filing a complaint against James for negligence. The effects of the accident went beyond John's physical injuries. He could not maintain the mortgage payments on his home or the payments on the truck he used as a self-employed truck driver. Consequently, his house went through foreclosure and his truck was repossessed. This sent John into a state of deep depression and he has since been diagnosed a manic depressive.<sup>1</sup>

While this example may be extreme, it illustrates the indirect damages that can result from the bad faith conduct of an insurer which usually are not recoverable from the original tortfeasor. If John were to receive an award in excess of the policy limits, James would be able to sue his insurer or assign his right to sue the insurer to John. John would then be able to bring an action asserting that the insurer acted in bad faith in carrying out its contractual obligations to James. In the above illustration, however, many of John's injuries were suffered as a direct result of the conduct of the insurer and not as a proximate result of any negligence on the part of the insured.

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1. This illustration is based upon knowledge gained through the author's employment in a personal injury law firm.

Most courts and state statutes do not allow third parties such as John to maintain an action against the insurer for bad faith,<sup>2</sup> and the case that would have allowed such an action has been recently overruled.<sup>3</sup> This Comment will explore the implications of this decision and discuss the statutes addressing insurance bad faith issues in four sections. It will: 1) examine the historical background of bad faith claims between insureds and insurers; 2) discuss whether current legislation aimed at eliminating unfair and deceptive settlement practices expressly provides a private remedy to individuals injured by its violation; 3) discuss whether the remedy, if provided by statute, extends to third parties; and 4) discuss the status of case law implying or rejecting a third party private cause of action based on unfair insurance practices acts. Finally, the author will suggest legislative changes and alternative methods of enforcement of statutory provisions relating to unfair insurance practices.

## II. DEVELOPMENT OF COMMON LAW BAD FAITH CLAIMS AND THE ADVENT OF STATUTORY BAD FAITH CLAIMS

### A. *Background of Bad Faith Claims Against Insurers*

Courts have long recognized that an insurer owes to its insured a duty to respond to settlement offers in good faith.<sup>4</sup> The failure of insurers to settle claims by or against the insured constitutes a breach of a contractual duty.<sup>5</sup> That duty includes a duty to act in good faith and fair dealing.<sup>6</sup> Where an insurer refuses to settle a claim against its insured within the policy limits, the insured may be exposed to personal liability exceeding those limits. In actions brought by insureds against their insurers as a result of such exposure, courts have applied standard of bad faith in determining whether the insurer breached its duty to the insured.<sup>7</sup>

Many jurisdictions recognize that an insured has a direct cause of action for bad faith against his insurer.<sup>8</sup> Generally, however, a third party does not have a direct cause of action against the insurer and

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2. S. ASHLEY, BAD FAITH ACTIONS § 6:09, at 18 (1984).

3. *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

4. S. ASHLEY, *supra* note 2 § 2:05, at 10.

5. *Id.* § 2:14, at 47.

6. *Id.*

7. *Hilker v. Western Auto. Ins. Co.*, 204 Wis. 1, 231 N.W. 257 (1931); *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

8. *Salamey v. Aetna Cas. & Sur. Co.*, 741 F.2d 874 (6th Cir. 1984); *Murphy v. Cincinnati Ins. Co.*, 576 F. Supp. 542 (E.D. Mich. 1983); *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983); *Spadafore v. Blue Shield*, 21 Ohio App. 3d 201, 486 N.E.2d 1201 (1985); *Clark v. Aetna Cas. & Sur. Co.*, 602 F. Supp. 995 (N.D. Tenn. 1984).

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must maintain his action through assignment of the insured's right to sue.<sup>9</sup> The assignment of interest generally results from the threat of an award exceeding the policy limits of the insured.<sup>10</sup> Courts refused to recognize a third party cause of action because at common law an insurer had no contractual duty to a third party.<sup>11</sup> The courts had to reevaluate the duty of an insurer to a third party, however, when more and more states enacted unfair settlement practice statutes.

### B. History of Unfair Settlement Practice Legislation

The insurance industry enjoyed freedom from federal regulation for over seventy-five years.<sup>12</sup> That freedom was threatened in 1944, when the Supreme Court held that Congress could apply antitrust laws to insurance companies.<sup>13</sup> In an attempt to avoid federal regulation, lobbyists persuaded Congress to pass the McCarran-Ferguson Act which declared an indefinite moratorium on the applicability of antitrust laws to the insurance industry.<sup>14</sup> Meanwhile, state insurance commissioners joined forces and drafted the Model Act Relating to Unfair Methods of Competition and Unfair and Deceptive Acts in Practices in the Business of Insurance ("the Model Act.")<sup>15</sup>

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9. S. ASHLEY, *supra* note 2 § 6:09, at 18; see generally Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 PAC. L.J. 833 (1982).

10. Comment, *Bad Faith: Limiting Insurers' Extra-contractual Liability in Texas*, 41 SW. L.J. 719, 721 (1987).

11. Krueger, *A Royal Globe Should Exist in Hawaii's Legal Museum*, 20 HAWAII BAR J. 29 (1987); McCarriston & Ito, *The Hawaii Courts Need Not Follow the Erroneous California Decision in Royal Globe*, 20 HAWAII BAR J. 33 (1987); Scroggins v. Allstate Ins. Co., 74 Ill. App. 3d 1027, 393 N.E.2d 718 (1979).

12. S. ASHLEY, *supra* note 2 § 9:02, at 2.

13. *Id.* In *Paul v. Virginia*, 75 U.S. 168 (8 Wall.) (1868), the United States Supreme Court determined that the business of insurance was not a part of commerce. The Court reconsidered its position in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), and held that the antitrust statutes could be properly applied to insurance companies.

14. S. ASHLEY, *supra* note 2 § 9:02, at 2-3. The solace the insurance industry has found in the McCarran-Ferguson Act may be threatened by the American Bar Association's House of Delegates decision to urge Congress to repeal the McCarran-Ferguson Act. Marcotte, *Repeal Insurance Exemption?*, 75 A.B.A. J. 32 (1989).

15. S. ASHLEY, *supra* note 2 § 9:02, at 3. The Model Act was drafted by The National Association of Insurance Commissioners (NAIC) in 1947 shortly after the passage of the McCarran-Ferguson Act. It is suggested that the Act was drafted in an effort to escape federal regulation of the insurance industry. "The NAIC carefully drafted its model act to delegate to the state insurance commissioners the same broad regulatory powers over the insurance industry that Congress had delegated to the Federal Trade Commission to regulate business generally." *Id.* The March, 1946 report of the Subcommittee on the Federal Trade Commission Act reveals that the Subcommittee members believed that "existing state laws must be strengthened if the business is to be in a position to demonstrate that the states are adequately covering the field." The Subcommittee was hopeful that the draft bill would provide "a basis for adequate and effective regulation of unfair or deceptive trade practices." Proceedings of the National Association of Insurance Commissioners 145-46 (1947).

State legislators used the Model Act as a guideline when they enacted similar statutes to address bad faith conduct of insurers.<sup>16</sup> Nearly every state has adopted some version of the Model Act.<sup>17</sup> The Model Act prohibits an insurer from engaging in certain conduct and practices, and sets forth administrative procedures and remedies for its violation.<sup>18</sup> It does not, however, contain a provision allowing a private cause of action by an individual. Although one commentator suggests that this was an intentional omission,<sup>19</sup> the committee notes are not clear on this issue.<sup>20</sup> One can speculate that the drafters omitted the provision to allow each state to decide whether a private cause of action would be available. On the other hand, it may have been omitted to indicate that the Model Act was to serve as a means of administrative enforcement only. In view of the fact that lobbyists for the insurance industry were successful in getting a moratorium on federal regulation of the industry, it is possible that they were also successful in keeping out a provision allowing a private cause of action.

Although no one knows whether the drafters of the original Model Act intended to omit a private remedy from its provisions, the drafters made it clear that the omission from 1971 revised Model Act was no oversight.<sup>21</sup> Regardless of the intent of the drafters of the Model Act, states enacting unfair settlement practice statutes are not bound by the language of the Model Act and may provide a private cause of action.

Some unfair settlement practice statutes allow an insured to bring a private cause of action against an insurer.<sup>22</sup> In a few states the class of persons who have standing to bring such actions has been broadened

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16. S. ASHLEY, *supra* note 2 § 9:02, at 4; *see also* Moradi-Shalal v. Fireman's Fund Ins. Co., *supra* note 3, at 297, 758 P.2d at 63, 250 Cal. Rptr. at 121.

17. *See* S. ASHLEY, *supra* note 2 § 9:02, at 4.

18. *Id.* at 3.

19. *Id.* § 9:03, at 6.

20. Carolyn Johnson, Assistant Counsel and Model Laws Coordinator of the NAIC, indicated that the committee notes and minutes taken during the drafting of the Model Act do not reveal the reason why the Model Act does not provide or prohibit a private cause of action. While the committee notes clearly indicate that the state insurance commissioners were empowered with enforcement, they do not reveal a specific intent to deny a private cause of action. The Subcommittee introducing the bill indicated that it did not intend the bill "to deprive the states of any powers which they now have or to eliminate any penalties now provided for specific violations." In addition, the bill provided that the powers given to the commissioners would be "in addition to any other procedures, penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive." Proceedings of the National Association of Insurance Commissioners 149, 152 (1947). This would suggest that the NAIC left any other remedies available for violations of unfair acts or practices to the state legislatures.

21. When the NAIC revised the Model Act in 1971, it deleted a provision creating a private cause of action. Moradi-Shalal v. Fireman's Fund Ins., 46 Cal. 3d at 299, 758 P.2d at 65, 250 Cal. Rptr. at 123.

22. S. ASHLEY, *supra* note 2 § 9:03, at 5.

to include third parties.<sup>23</sup> For example, a Massachusetts statute specifically grants an injured party, including a third party, a private cause of action against an insurer for violation of its statute.<sup>24</sup> If a statute does not expressly provide a private cause of action, most courts refuse to imply that one exists.<sup>25</sup> These decisions are generally based on an analysis of the legislative intent.<sup>26</sup>

In addition to the problems courts have in deciding whether to imply a private cause of action, critics complain that unfair settlement practice legislation lacks enforcement power.<sup>27</sup> Moreover, when statutes have sufficient enforcement power, agencies have been criticized for failing to use their enforcement power against violators.<sup>28</sup> Very few state insurance commissioners who have the power to enforce these statutes have exercised that power to protect claimants from unfair settlement practices.<sup>29</sup>

To maximize protection against unfair settlement practices, legislation must provide an adequate remedy to anyone adversely affected by the bad faith conduct of an insurer. When a third party is precluded from asserting a cause of action against an insurer, the third party may suffer unrecoverable damages if he is unable to obtain an assignment from the insured. The denial of the right to recover against an insurer for its bad faith conduct would cause a third party to be victimized twice as a result of one occurrence. First, the third party suffers injuries and other damages as a direct result of the negligence of the insured. Second, the third party may suffer emotional distress, possible financial collapse, and other consequential damages as a direct result of the insurer's bad faith. If the third party's injury from the negligence of the tortfeasor does not warrant a judgment in excess of the policy limits, the misconduct of the insurer may go unchallenged.

Courts recognize the cause of action for bad faith in order to protect insureds from the risk of an insurer abusing its contractual obligations.<sup>30</sup> This rationale is reasonable in light of the insured's potential liability

23. *Id.* § 9:08, at 37.

24. MASS. GEN. L. ch. 93A, § 9(1) (1979).

25. See, e.g., *Mavroudis v. State Wide Ins. Co.*, 121 A.D.2d 433, 503 N.Y.S.2d 133 (1986); *Bell v. League Life Ins. Co.*, 149 Mich. App. 481, 485, 387 N.W.2d 154, 156 (1986); *Kimpel v. Dairy Farm Leasing Co., Inc.*, C.A. No. WMS-86-8 (Ct. App. Ohio Jan. 9, 1987).

26. S. ASHLEY, *supra* note 2 § 9:03, at 7.

27. *Id.* § 9:02, at 3. See also Hatch, 'Unfair Claims Practice Act' Creates Private Cause of Action, MINN. TRIAL LAW., SPECIAL EDITION, 4 (1984). Since this article was published, the Minnesota Supreme Court has ruled that the Minnesota Unfair Claims Practices Act does not create a private cause of action. *Morris v. American Family Mut. Ins. Co.*, 386 N.W.2d 233 (1986).

28. S. ASHLEY, *supra* note 2 § 9:02, at 3.

29. *Id.*

30. *Id.* § 6:09, at 17.

for awards exceeding the policy limits. However, any person who has suffered as a result of an insurer's delay or refusal to pay a valid claim deserves redress for such unfair tactics under statutes which prohibit such conduct. Courts could accomplish this in several ways. Legislation could provide a direct cause of action, or empower a state official such as the insurance commissioner to bring an action on behalf of the injured party either in court or before an appropriate administrative agency. Legislation could also provide recovery of a certain percentage of a fine assessed against an insurer for violations of the act.<sup>31</sup>

Most state legislation neither expressly denies nor allows a private right of action to third party litigants. One commentator suggested that enacting a version of the Model Act with substantially all of its provisions remaining is an indication that the state legislators "shared the intention of the NAIC drafters of the Model Act."<sup>32</sup> Whatever the explanation, states must come to grips with the litigious monster created by unclear and indefinite statutes and revise the statutes with clear, unambiguous language. At least three jurisdictions have chosen to deviate from a strict adoption of the Model Act. The statutes in these states expressly provide or prohibit a private cause of action under their unfair claims settlement practice statutes.<sup>33</sup>

### III. STATUTES WHICH EXPRESSLY PROVIDE OR DENY A PRIVATE CAUSE OF ACTION

#### A. Tennessee

Tennessee does not recognize bad faith as a cause of action at common law,<sup>34</sup> and Tennessee's unfair claim settlement practice statute expressly denies *any* private cause of action.<sup>35</sup> Hence, neither third parties nor insureds who suffer damages resulting from the unfair conduct of insurers have a private cause of action for bad faith under statutory law or common law.

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31. See, e.g., TENN. CODE ANN. § 56-7-105(a) (Supp. 1988) which provides:

The insurance companies of this state ... in all cases when a loss occurs and they refuse to pay the same within sixty (60) days after a demand shall have been made by the holder of the policy ... shall be liable to pay the holder of said policy ... in addition to the loss and interest thereon, a sum not exceeding twenty-five percent (25%) on the liability for said loss; provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy ....

32. S. ASHLEY, *supra* note 2 § 9:03, at 7.

33. TENN. CODE ANN. § 56-8-104(8) (Supp. 1988); FLA. STAT. ANN. § 624.155(1) (West Supp. 1989); MASS. GEN. L. ch. 93A, § 9(1) (1986).

34. Chandler v. Prudential Ins. Co., 715 S.W.2d 615 (Tenn. Ct. App. 1986)

35. TENN. CODE ANN. § 56-8-104(8) (Supp. 1988) enumerates unfair claim settlement practices. The statute provides that "the Commissioner shall have sole enforcement

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Although the statute precludes insureds and third party claimants from suing an insurer for violations of the unfair claims settlement practices, the statute assesses a maximum 25% penalty against insurers for bad faith failure to pay.<sup>36</sup> This penalty is payable to a holder of the policy under which the failure to pay is based.<sup>37</sup> In order to be eligible to receive this money, the policyholder must establish that additional expense, loss, or injury was incurred as a result of that failure to pay.<sup>38</sup> Thus, while insureds have no direct cause of action under the statute or at common law, they are entitled to some measure of damages resulting from the violation of the statute. No such corresponding recovery is available to third party claimants.

The language of the Tennessee statute is a strong indication that third parties are not the class intended to be protected by the statute. Apparently, the legislators intended to preclude third parties or insureds from asserting a cause of action against insurers for violating Tennessee's unfair settlement practice act. Also, legislators apparently intended to limit bad faith damages recoverable against insurers by insureds under the statute and deny recovery by third parties.

Tennessee is unlike the majority of states which allow the tort of bad faith to be brought against insurers.<sup>39</sup> Further, it is rare that a legislative enactment clearly reveals the legislature's intent to deny a private cause of action as is shown by the Tennessee statute.

### B. *Massachusetts*

While Massachusetts expressly provides a private cause of action, it does not do so through its unfair settlement practice statute.<sup>40</sup> Chapter 93A of the General Laws of Massachusetts, however, which governs the general conduct of insurers, expressly provides a private cause of action for violation of that chapter.<sup>41</sup> The original statute did not have

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authority for this subdivision, and notwithstanding any other laws of this state, a private right of action shall not be maintained under this subdivision."

36. *See, e.g.*, TENN. CODE ANN. § 56-7-105(a) (Supp. 1988).

37. *Id.*

38. *Id.*

39. *See generally* S. ASHLEY, *supra* note 2 § 2:05, at 9.

40. MASS. GEN. L. ch. 176D, § 3(9) (1986) enumerates unfair claim settlement practices but does not provide a private cause of action.

41. MASS. GEN. L. ch. 93A, § 9(1) (1986) reads in pertinent part:

Any person . . . who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder or any person whose rights are affected by another person violating the provisions of clause (9) of section three of chapter one hundred and seventy-six D may bring an action in the superior court, or in the housing court . . . whether by way of original complaint, counterclaim, cross-claim or third party

such a provision. In *Mahaney v. John Hancock Mutual Life Insurance Co.*,<sup>42</sup> which was decided before chapter 93A was amended, the appellate court of Massachusetts refused to imply a private cause of action based upon that section.<sup>43</sup> After the *Mahaney* decision, an amendment to chapter 93A incorporated the unfair settlement practices section of chapter 176D of the General Laws of Massachusetts.<sup>44</sup> As a result of that revision, courts were required to determine whether the new remedy afforded by chapter 93A included a private cause of action for violation of the unfair settlement practice statute.<sup>45</sup>

Soon after the amendment, the Massachusetts Supreme Court, in *Van Dyke v. St. Paul Fire and Marine Insurance Co.*,<sup>46</sup> addressed the issue of whether a third party had a statutory right to bring an action for violation of the unfair settlement practice act.<sup>47</sup> *Van Dyke* involved a third party claim by a patient and his wife against a physician's insurer. The plaintiffs had obtained a judgment against the physician for negligence and filed a subsequent action against the physician's insurer for unfair and deceptive settlement practices in handling their claim. The plaintiffs did not prevail because they failed to establish any injury as a result of the unfair or improper practice. The court noted, however, that they had standing to bring the action based upon section 9(1) of chapter 93A.<sup>48</sup> The court acknowledged that the amendment "substantially broadened the class of persons protected under the statute" to include third parties.<sup>49</sup>

### C. Florida

Florida has also joined the list of the few states expressly providing for a private cause of action against insurers violating the state's unfair settlement practice act.<sup>50</sup> Prior to enactment of Florida Stat. 624.155, it was well settled that an insured could file a claim against an insurer for failing to settle a claim by a third party if the court awarded

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action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

42. 6 Mass. App. Ct. 919, 380 N.E.2d 140 (1978).

43. *Id.* at 920, 380 N.E.2d at 142.

44. MASS. GEN. L. ch. 93A, § 9(1) (1986).

45. *Whitney v. Continental Ins. Co.*, 595 F. Supp. 939 (D. Mass. 1984).

46. 388 Mass. 671, 448 N.E.2d 357 (1983).

47. *Id.*

48. MASS. GEN. L. ch. 93A, § 9(1) (1986). The language is reproduced *supra* note 41.

49. 388 Mass. 671, 675, 448 N.E.2d 357, 360 (1983).

50. FLA. STAT. ANN. § 624.155(1) reads in part:

Any person may bring a civil action against an insurer when such person is damaged:

(b) By the commission of any of the following acts by the insurer:

1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured



damages which exceeded the insured's policy limits.<sup>51</sup> The insured, however, could not proceed against his insurer for failing to settle the insured's own claim.<sup>52</sup>

In *Opperman v. Nationwide Mutual Fire Insurance Co.*,<sup>53</sup> the plaintiffs sued their insurer on the basis of section 624.155. The trial court dismissed their complaint on the ground that a first party cause of action against one's own insurer did not exist. In reversing the trial court, the court of appeals indicated that the plain meaning of the statute precluded the need for inquiry into the legislative intent to determine whether the plaintiffs had standing.

Although the *Opperman* case was not a direct cause of action by a third party claimant, it implies that the language in the statute would allow a third party to bring an action against an insurer. The issue, however, is not settled. The statute specifically indicates that the insurer must act fairly and honestly "toward its insured."<sup>54</sup> This phrase could be interpreted as the legislators' intent to extend the right to sue insurers under the statute to the insured and not to third parties.

#### IV. IMPLYING A THIRD PARTY PRIVATE CAUSE OF ACTION

Tennessee, Florida and Massachusetts are examples of states which have taken the path not chosen and have expressly provided or denied a private cause of action for third parties under their unfair settlement practice statutes. Most other state legislation is silent on the issue, and, therefore, the courts must decide whether to imply a private cause of action. Most courts have refused to imply a private cause of action.<sup>55</sup> Even California, once the forerunner in implying a private cause of action under the statute, has joined the majority.<sup>56</sup>

##### A. Recognition of an Implied Private Cause of Action

Since the landmark decision of *Royal Globe Insurance Co. v. Superior*

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and with due regard for his interests . . . . Notwithstanding the provisions of the above to the contrary, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

FLA. STAT. ANN. 624.155(1) (West Supp. 1989)

51. *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. Dist. Ct. App. 1987).

52. *Id.*

53. 515 So. 2d 263 (Fla. Dist. Ct. App. 1987).

54. FLA. STAT. ANN. 624.155(1)(b) (West Supp. 1989).

55. S. ASHLEY, *supra* note 2 § 9:03, at 7.

56. *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

*Court*,<sup>57</sup> courts in California have been split on whether to allow third party causes of action against insurers.<sup>58</sup> Their dilemma has been remedied by the recent case of *Moradi-Shalal v. Fireman's Fund Insurance Co.*,<sup>59</sup> which explicitly overruled *Royal Globe* and denied that a private cause of action exists under the California Unfair Insurance Practice Act.<sup>60</sup>

In *Royal Globe*, the California Supreme Court recognized an implied cause of action against insurers who violate the state's unfair settlement practice statute. It was the first case to recognize a third party private cause of action under the statute.<sup>61</sup>

The plaintiff in *Royal Globe* was a third-party claimant who filed suit against several defendants which included the insurer, Royal Globe Insurance Company, and the insured, a food market. The claimant alleged bad faith against the insurer for failing to effectuate a prompt, fair, and equitable settlement and alleged that Royal Globe's agent violated the state's Unfair Practice Act by advising the claimant not to obtain the services of an attorney. The defendants demurred to the complaint and moved for judgment on the pleadings on the grounds that: (1) the insurance commissioner had exclusive power to enforce the provisions of the statute; (2) the legislature's intent was to protect the interests of insureds only; and (3) the claimant could not sue the insured and insurer at the same time.<sup>62</sup>

The court, although agreeing that the claimant could not sue the insurer and the insured in the same action, held that the statute implied a private cause of action for third party claimants as well as insureds.<sup>63</sup> This decision was based on the court's interpretation of section 790.09 of the California Code, which provides that a cease and desist order from the commission does not absolve insurers from "*civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive.*"<sup>64</sup> The court reasoned that because the statute did not read "under any other laws of this State," anyone who had a claim against the insurer could enforce it by an appropriate action under that statute.<sup>65</sup> The court refused to consider

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57. 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979), *rev'd*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

58. S. ASHLEY, *supra* note 2 § 9:03, at 5-6; *see generally* Fowler, *Statutory Third Party Unfair Practice Suits Following Settlement: The Impact of Royal Globe's Conclusion Requirement*, 22 TORT AND INS. J. 640 (1987).

59. 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

60. *Id.* at 304-05; 758 P.2d at 68-69, 250 Cal. Rptr. at 126-27.

61. S. ASHLEY, *supra* note 2 § 9:06.50, at 21.

62. 23 Cal. 3d at 884, 592 P.2d at 332, 153 Cal. Rptr. at 845.

63. *Id.*

64. CAL. INS. CODE § 790.09 (West 1979), *quoted in* 23 Cal. 3d at 885, 153 Cal. Rptr. at 845 (emphasis in original).

65. 23 Cal. 3d at 885-86, 592 P.2d at 333, 153 Cal. Rptr. at 845-46.

evidence offered by the defendant that the legislative intent was to provide the commissioner with remedies against insurers and not to provide a private cause of action.<sup>66</sup>

The defendant then argued that the California statute should be given the same construction as the Federal Trade Commission Act (FTC) which does not provide for a private cause of action. This argument was advanced on the following theory: The California statute was an adopted version of the Model Act which was patterned after the FTC Act. By analogy, since the FTC Act did not provide a private cause of action, the court should not imply a private cause of action in the California statute. The court rejected this argument because there was no provision in the federal statute comparable to section 790.09, and because the federal statute related "only to enforcement proceedings brought by the Commission or the Attorney General, or the review thereof."<sup>67</sup>

The defendant then attempted to limit the implied private cause of action to insureds. The defendant argued that even if the statute provided a private cause of action, that right did not extend to third-party claimants because the violation of the act was comparable to a breach of duty which runs only to the insured.<sup>68</sup> The court rejected that argument by relying on the language of the statute and the legislative committee's failure to make changes to the bill when the committee was informed that the language "could be construed to affect third parties."<sup>69</sup> The court noted that "it is a reasonable implication that the committee's inaction represented a deliberate decision that third-party claimants were to enjoy the protection afforded by the bill."<sup>70</sup>

Finally, the court rejected defendant's contention that the improper conduct of the insurer was actionable only if it were committed with such frequency as to constitute general business practice.<sup>71</sup> The following provision is considered to be an unfair and deceptive act or practice under the statute:

66. *Id.* at 887, 592 P.2d at 334, 153 Cal. Rptr. at 846-47. The court dismissed the evidence as not persuasive because the individual submitting the legislative intent was not a legislator nor was he acting on behalf of the legislature during his testimony. The court deemed other information offered as evidence too general and remote.

67. *Id.* at 887-88, 592 P.2d at 334, 153 Cal. Rptr. at 847 (quoting *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 1001 (D.C. Cir. 1973)).

68. 23 Cal. 3d at 888, 592 P.2d at 335, 153 Cal. Rptr. at 847.

69. *Id.*, quoting a representative of the Department of Insurance testifying before various legislative committees.

70. *Id.* at 889, 592 P.2d at 335, 153 Cal. Rptr. at 848. The court noted that the language of the statute made use of the terms "claimant" and "insured." In some places each word appeared alone and in some places both words appeared together. This ambiguity was brought to the attention of the legislative committee considering the bill. However, no changes were made "in spite of these concerns."

71. *Id.* at 890, 592 P.2d at 335, 153 Cal. Rptr. at 848.

(h) knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices.<sup>72</sup>

The court adopted the view that an insurer or claimant could prevail under two alternative methods. He must either show: (1) that the act, whether single and isolated or one of a series of acts, was knowingly committed; or (2) that the act was performed with such frequency as to indicate a general business practice.<sup>73</sup>

The *Royal Globe* decision sparked much debate and controversy over whether similar statutes provide a private cause of action.<sup>74</sup> Generally, critics complain that the decision is contrary to common law which expressly denies the third party a cause of action against an insurer without an assignment by the insured.<sup>75</sup>

The reasons given by courts for rejecting the *Royal Globe* decision often center around the specific language of the state statute.<sup>76</sup> For example, in *Scroggins v. Allstate Insurance Co.*,<sup>77</sup> an Illinois appellate court refused to consider the opinion in *Royal Globe* because the language of the Illinois statute differed from the California statute. While the California statute allowed for civil liability "under any laws of this State" [including the Unfair Practice Act], the Illinois statute allowed for civil liability "under any other laws of [the] State."<sup>78</sup> In *Royal Globe*, the California court interpreted the absence of the word "other" as providing a private cause of action under that statute.<sup>79</sup> The Illinois court determined that its statute referred to liability under any other laws of the state, and concluded that *Royal Globe* was inapplicable.<sup>80</sup> Instead, the court decided the case on common law principles.

Although the *Scroggins* court recognized that an improper claims practice included a failure to affirm or deny liability on first or third party claims, it refused to imply a private right of action for third parties. The court accepted the common law view that the insurer's

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72. *Id.* at 883 n.1, 592 P.2d at 331 n.1, 153 Cal Rptr. at 844 n.1 (quoting Cal. Ins. Code § 790.03 (West 1979)).

73. *Id.* at 891, 592 P.2d at 336, 153 Cal. Rptr. at 849.

74. S. ASHLEY, *supra* note 2 § 9:06.50, at 21; see generally Fowler, *supra* note 58, at 640-61. Jones v. National Emblem Ins. Co., 436 F. Supp. 1119 (S.D. Mich. 1977).

75. *Supra* note 11.

76. See generally Krueger, *supra* note 11; McCorriston & Ito, *supra* note 11; see also S. ASHLEY, *supra* note 2 § 9:04.50 for the grammatical differences between the California statute and the Model Act.

77. 74 Ill. App. 3d 1027, 393 N.E.2d 718 (1979).

78. *Id.* at 1035.

79. *Royal Globe Ins. Co. v. Superior Court*, 23 Cal. 3d at 885-86, 592 P.2d at 332-33, 153 Cal. Rptr. at 845-48.

80. *Scroggins v. Allstate Ins. Co.*, 74 Ill. App. 3d 1027, 1035, 393 N.E.2d 718, 724 (1979).

duty only runs to the insured, reasoning that "the statute would appear to have been enacted for the benefit of the insured, analogous to the common law duty discussed above . . . as well as to provide an administrative enforcement mechanism for the benefit of the public at large."<sup>81</sup> The language of the statute, however, suggests an intent to cover both insureds and third parties.<sup>82</sup>

The *Scroggins* court construed the right to sue an insurer very narrowly. The court concluded that in light of the fact that common law does not provide a direct cause of action for third parties, such an action should not be implied without explicit legislative intent to provide one.<sup>83</sup> Apparently, the court failed to note the distinction between the common law breach of contract action and the statutory bad faith action.

The common law breach of contract action in the third-party context is based upon the underlying contractual relationship between the insured and the insurer. Such an action is instituted when the failure of the insurer to protect the insured's interests results in a jury verdict which exceeds the insured's policy limits.<sup>84</sup> Assignment of the insured's interest against an insurer allows a third party to sue the insurer only to the extent by which the insured may have been liable to the third party as a result of the insurer's bad faith.<sup>85</sup> Without the assignment, a third party would be left without a remedy for the bad faith actions of an insurer.

Under unfair insurance practice statutes, the statutory language extends beyond the contractual duty to the insured. For example, Ohio Revised Code Section 3901.20 prohibits any person, including all legal entities, from engaging in any practice determined to be "an unfair or deceptive act or practice in the business of insurance."<sup>86</sup> Consequently, a statute which expressly provides a cause of action for an insured is a remedy available in addition to the insured's breach-of-contract remedy. A statute allowing a third party a private cause of action is, generally, the only remedy available to third parties.

Unlike the *Scroggins* court, a Montana district court, in *Marzolf v.*

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81. *Id.* at 1034, 393 N.E.2d at 723.

82. ILLINOIS INSURANCE CODE Ch. 73 § 766.6," 154.6 (1988) provides: "Acts constituting improper claims practice. Any of the following acts by a company, if committed without just cause and in violation of Section 154.5, constitutes an improper claims practice: a) knowingly misrepresenting to claimants and insureds relevant facts or policy provisions relating to coverages at issue . . ."

83. *Scroggins v. Allstate Ins. Co.*, 74 Ill. App. 3d 1027, 1036, 393 N.E.2d 718, 724 (1979). "While other unfair practices defined in the statute may refer to claimants, we believe that a more explicit legislative intent to extend the duty to settle to third party claimants should be required where imposition of such a duty would be in derogation of so much common law." *Id.*

84. Comment, *supra* note 10; see also Allen, *supra* note 9, at 834-36.

85. Allen, *supra* note 9, at 834.

86. OHIO REV. CODE ANN. § 3901.20 (Anderson Supp. 1988).

Hoover,<sup>87</sup> recognized the distinction between the contractual duty owed to an insured and the statutory duty owed to a third party claimant when it noted that "[t]he duty owed a third party claimant by an insurer is akin to, yet distinct from, the fiduciary duty running from an insurer to its insured. . . . The latter duty being a common law duty attendant a contract of insurance."<sup>88</sup> The statutory duty of an insurer to a third party, therefore, should not be conditioned upon a contractual relationship running to the third party from the insured. This duty should exist where a statute creates a cause of action which does not rely upon common law remedial rights.

The difficulty that courts in various jurisdictions are having is determining whether the statutes imply a private cause of action. Subsequent to the *Scroggins* decision, the third district appellate court in Illinois held that there was no private right of action for either an insured or a third party provided under the statute.<sup>89</sup> This split of authority within the same jurisdiction is an example of the uncertainty which follows when a statute does not expressly provide or deny a private right of action.

Most courts have refused to imply a cause of action for third party claimants because the language of the statute does not so provide. The Iowa Supreme Court in *Seeman v. Liberty Mutual Insurance Co.*,<sup>90</sup> however, believed that "a private cause of action would be consistent with the underlying purpose of the statute."<sup>91</sup> Although the court concluded that the statute did not provide a private cause of action, it noted that such a provision would encourage injured parties to seek enforcement of the statute and provide a deterrent against further violations.<sup>92</sup> In addition, a direct cause of action can serve valid public interests such as decreasing the quantity of litigation and encouraging settlement of claims.<sup>93</sup> This view, however, has not been favored among

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87. 596 F. Supp. 596 (Mont. 1984).

88. *Id.* at 599.

89. *Van Vleck v. Ohio Cas. Ins. Co.*, 128 Ill. App. 3d 959, 961, 471 N.E. 2d 925, 927 (1984).

90. *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35 (Iowa 1982).

91. *Id.* at 41. The court believed that third parties were among the class protected by the statute, and that a cause of action would exist if the legislature intended the statute to provide a private cause of action.

92. *Id.* at 43.

93. *See Jones v. National Emblem Ins. Co.*, 436 F. Supp. 1119 (S.D. Mich. 1977), in which the court stated:

A direct cause of action by the injured person against the insurer serves the public interest in a number of ways. First, it encourages the settlement of personal injury claims . . . eliminates the danger of the insured reaping a windfall from his own wrongdoing by slipping away with and quickly dissipating the proceeds of a judgment against his insurer . . . [and] reduces the quantity of litigation required to discharge the insured's liability on the underlying judgment. *Id.*

courts or scholars;<sup>94</sup> and even California's liberal judicial system has surrendered to the majority view by overruling *Royal Globe*.<sup>95</sup>

### B. Refusal to Imply a Private Cause of Action

*Moradi-Shalal*<sup>96</sup> issued the death knell for *Royal Globe* nearly ten years after it was decided. Constant criticism by courts and scholars of the *Royal Globe* decision finally took its toll on California's highest court. In *Moradi-Shalal*, the court announced that developments occurring after *Royal Globe* required a reexamination of that decision.<sup>97</sup> In overruling *Royal Globe*, the California Supreme Court adopted the arguments that the defendant and the dissent had made nearly ten years earlier. The action by the court not only affected third party actions but first party actions as well. The court concluded that the legislature did not intend to create a private cause of action for any individual and that "developments occurring subsequent to our *Royal Globe* decision convince us that it was incorrectly decided, and that it has generated and will continue to produce inequitable results, costly multiple litigation, and unnecessary confusion unless we overrule it."<sup>98</sup>

While some may interpret the *Moradi-Shalal* decision as the California Supreme Court's belief that allowing a private cause of action under the statute would create the adverse effects discussed in the opinion, the majority dispels this interpretation quite clearly. The court indicated that the California legislature had not yet "manifested an intent to create such a private cause of action," and "nothing we hold herein would prevent the Legislature from creating additional civil or administrative remedies, including, of course, creation of a private cause of action for violation of section 790.03."<sup>99</sup>

*Royal Globe* and its progeny clearly illustrate the error in attempting to redefine and clarify statutory law by second-guessing the intent of the legislators in adopting statutes. Many jurisdictions have refused to imply a private right of action regardless of the relationship between the parties.<sup>100</sup> In making this determination, the statute is generally

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94. The court in *Moradi-Shalal v. Fireman's Fund Insurance Company* has conveniently listed a number of court cases and scholarly commentators which have rejected the position taken in *Royal Globe*. *Moradi-Shalal v. Fireman's Fund Ins. Co.*, 46 Cal. 3d at 297-99, 758 P.2d at 63-65, 250 Cal. Rptr. at 122-123 (1988).

95. *Id.* at 287, 758 P.2d 58, 250 Cal. Rptr. 116.

96. *Id.*

97. *Id.* at 292, 758 P.2d at 60, 250 Cal. Rptr. at 118.

98. *Id.* at 297, 758 P.2d at 63, 250 Cal. Rptr. at 121.

99. *Id.* at 305, 758 P.2d at 69, 250 Cal. Rptr. at 127.

100. See, e.g., *Mavroudis v. State Wide Ins. Co.*, 121 A.D.2d 433, 503 N.Y.S.2d 133 (1986); *Kurrus v. CNA Ins. Co.*, 115 A.D.2d 593, 496 N.Y.S.2d 255 (1985); *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 43 (Iowa 1982).

interpreted as providing for enforcement only by the superintendent of insurance or a similarly situated individual.<sup>101</sup>

In Ohio, where the Model Act has not been formally adopted, the courts have refused to imply a private cause of action under Ohio Revised Code Sections 3901.20 and 3901.21 and rules promulgated by the Department of Insurance.<sup>102</sup> Section 3901.20 prohibits insurance companies from engaging in certain unfair and deceptive practices defined in section 3901.21.<sup>103</sup> The superintendent of insurance is authorized by section 3901.041 to promulgate rules necessary to exercise his powers under Title 39 concerning the conduct and practices of insurance companies.<sup>104</sup> Pursuant to that grant of authority, the Department of Insurance promulgated Rule 3901-1-07(C) which defines additional unfair practices not covered by section 3901.21.<sup>105</sup> The Ohio unfair settlement practices act expressly provides a procedure for injured parties to follow when they believe an insurer has committed an unfair or deceptive act within the meaning of Ohio Revised Code section 3901.21 or rules promulgated by the superintendent of insurance.<sup>106</sup>

In *Strack v. Westfield Co.*,<sup>107</sup> an Ohio appellate court was faced with whether to imply a private cause of action pursuant to Rule 3901-1-07(C). The plaintiffs sued their insurer for bad faith as a result of its refusal to honor a claim filed with the company when fire destroyed their home. The plaintiffs argued that Ohio Administrative Code 3901-1-07 created an implied private cause of action in favor of insureds. To determine whether to infer a private cause of action, the court applied the four-prong test set forth by the United States Supreme Court in *Cort v. Ash*:<sup>108</sup>

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' ... Second, is

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101. See generally Krueger, *supra* note 11; McCorriston & Ito, *supra* note 11.

102. *Strack v. Westfield Co.*, 33 Ohio App. 335, 515 N.E.2d 1005 (1986); *Kimpel v. Dairy Farm Leasing Co., Inc.*, C.A. No. WMS-86-8 (Ct. App. Ohio Jan. 9, 1987).

103. OHIO REV. CODE ANN. § 3901.20 (Anderson Supp. 1988) states: "No person shall engage in this state in any trade or practice which is defined in sections 3901.19 to 3901.23 of the Revised Code as, or determined pursuant to those sections to be, an unfair or deceptive act or practice in the business of insurance. . . ."

104. OHIO REV. CODE ANN. § 3901.041 (Anderson Supp. 1988).

105. OHIO ADMIN. CODE § 3901-1-07 (1988).

106. OHIO REV. CODE ANN. § 3901.22(A) (Anderson Supp. 1988) reads in part:

Any person aggrieved with respect to any act that the person believes to be an unfair or deceptive act or practice in the business of insurance, as defined in Section 3901.21 of the Revised Code or in any rule of the superintendent of insurance, may make written application to the superintendent for a hearing to determine if there has been a violation of Section 3901.20 of the Revised Code.

107. 33 Ohio App. 3d 336, 515 N.E.2d 1005 (1986).

108. 422 U.S. 66 (1975).



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there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law. . . .<sup>109</sup>

Applying three of the four prongs,<sup>110</sup> the court found no legislative intent that would create or deny a private cause of action. It further determined that creating such a cause of action would be inconsistent with the underlying purpose of the Act.<sup>111</sup> The court refused to second-guess the legislature and imply a private cause of action, regardless of whether the action is brought by insureds or third parties.

Similarly, the Michigan courts have also determined that no private cause of action exists under the Uniform Trade Practices Act (UTPA).<sup>112</sup> Section 500.2026 of the Michigan statutes, which governs the conduct of insurance companies, contains no specific private cause of action provision, and the courts have refused to imply one.<sup>113</sup> In *Bell v. League Life Insurance Co.*,<sup>114</sup> plaintiffs sought to strike certain provisions from their policies as violative of the UTPA. The court held that "the UTPA provides a comprehensive scheme of enforcement of the rights and duties it creates, that the scheme of enforcement is exclusive, and that the plaintiffs have no private cause of action arising from the provisions of the Act."<sup>115</sup>

Proponents of the private cause of action in the state of Kentucky had no better luck than those in Ohio and Michigan. The history of Kentucky statutory law reveals that legislators favored establishing a private cause of action against insurers by third-party claimants through proposed legislation which provided for a direct cause of action for

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109. *Strack v. Westfield Co.*, 33 Ohio App. at 337, 515 N.E.2d at 1007 (quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975) (emphasis in original)).

110. The court noted that the fourth prong was inapplicable to state cases.

111. The *Strack* court, citing *D'Ambrosio v. Pennsylvania Nat'l. Mut. Cas. Ins. Co.*, 494 Pa. 501, 431 A.2d 966 (1981), stated:

The Department of Insurance was established in order to determine what insurance practices were unfair or deceptive and how to best control them. The combination of administrative remedies and civil penalties reflects the legislative solution to a problem perceived by it. This court will not substitute its judgment for that of the legislature, which could have easily expressly provided for such a remedy.

112. *Bell v. League Life Ins. Co.*, 149 Mich. App. 481, 387 N.W.2d 154 (1986); *Young v. Michigan Mut. Ins. Co.*, 139 Mich. App. 600, 605, 362 N.W.2d 844 (1984).

113. *Bell v. League Life Ins. Co.*, 149 Mich. App. 481, 387 N.W.2d 154 (1986).

114. 149 Mich. App. 481, 387 N.W.2d 154 (1986).

115. *Id.* at 485, 387 N.W.2d at 156. The court also noted that enforcement of the Act was governed by M.C.L. 500.230 which allows a private individual a cause of action against an insurer for the interest penalty imposed under § 2006 of the Act. Claimants, however, cannot maintain a cause of action under the Unfair Trade Practice Act (M.C.L. § 500.2001-2050).

injured third parties.<sup>116</sup> Prior to passage of the legislation, however, the language providing for this remedy was deleted.<sup>117</sup> Although Kentucky seems to favor the recognition of a private cause of action on behalf of persons injured by violation of state statutes,<sup>118</sup> the removal of language supporting a third party cause of action against an insurer indicates that a private cause of action does not extend to third parties.

## V. BALANCING INTERESTS

The unfair settlement practice acts enacted by states in response to complaints of bad faith conduct by insurers is a valiant attempt to be equitable and fair to all parties concerned. Some states have been more aggressive than others in meeting the problem head-on with clear, unambiguous statutory language and specific remedial rights for victims of these unfair practices. Much more must be done to end the friction between insurers and their insureds and between insurers and third parties. Legislative changes should be considered which go to the heart of the problem of third-party rights. Further, other methods of claim resolution should be considered as an alternative to traditional judicial channels. California has left the door open for a statute which expressly provides a private cause of action to remedy misconduct against third parties. Although insurers must act in the best interest of their insureds, the duty of good faith and fair dealing can extend to third parties without raising a conflict of interest issue.

### A. Suggested Legislative Changes

Generally, state legislators have let the courts decide whether a private cause of action exists under unfair settlement practice acts. The courts have either refused to accept this responsibility and denied the private cause of action unless legislatures expressly provides, or have attempted to second-guess the legislative intent and either prohibited or implied a private cause of action. *Royal Globe* provides a valuable lesson in the pitfalls of second-guessing legislators. The simple solution to avoid varying opinions and confusion about the availability of private causes of action and the applicability of such an action to third parties is to leave the decision with the legislature. The number of lawsuits initiated to resolve the issue of whether a private right of action exists can be significantly reduced by including one short sentence in unfair settlement

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116. Underwood, *Insurance*, 72 KY. L.J. 403, 410 (1983). The author noted that proposed legislation provided a direct cause of action for third-party claimants. (citing H.R. 360, 1982 Reg. Sess. (introduced by Rep. Jim LeMaster) §1(5).

117. KY. REV. STAT. ANN. § 304.12-230 (Michie/Bobbs-Merill 1988).

118. Underwood, *supra* note 116, at 412.

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practice statutes either permitting or prohibiting a private cause of action. If legislators refuse to allow a private cause of action, they should at least provide for recovery of actual damages incurred by *any* individual who has suffered because of a violation of the statute.

As one commentator suggested,<sup>119</sup> legislators should stop passing the buck and squarely address whether unfair settlement practice acts will expressly provide or deny a private cause of action for violations by insurers. This would necessarily require a further determination of whether such an action, if allowed, extends to third-party claimants. The statutory language of these statutes should be rephrased to the extent that it clearly removes any ambiguity or doubt as to the legislative intent.

### B. *Alternatives to Traditional Litigation*

An apparent need exists for redress for persons injured as a direct result of violations of unfair settlement practice statutes. In those states which do not provide a private cause of action, the policing agency must become more effective in prosecuting violators. Alternatively, an individual injured as a result of the violations should be allowed to bring a private action for damages directly against the insurer.

The increase in complaints against insurers must be met with an effective remedy which reduces litigation and serves the interest of insureds, third parties, and the insurance industry. Perhaps the refusal to expressly or impliedly grant a private cause of action against insurers represents a reluctance by the legislature to open the floodgates to private actions against insurers for bad faith in their settlement practices.<sup>120</sup> Undoubtedly, lobbyists trying to take the sting out of these statutes are concerned about the possible monetary awards which would result were private citizens allowed to present their case of bad faith to a jury of their peers.<sup>121</sup>

The concern for excessive jury awards can be alleviated by the creation of a tribunal consisting of impartial individuals to review and assess

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119. *Id.*

120. A dissenter in the *Royal Globe* case commented that allowing private cause of action would increase suits against insurers who refuse settlement offers: "[I]n almost every case in which an insurer hereafter declines a settlement offer the injured third party claimant will be tempted to file an independent action against the carrier..." *Royal Globe Ins. Co. v. Superior Ct.*, 23 Cal. 3d 880, 898, 592 P.2d 329, 341, 153 Cal. Rptr. 842, 854 (1979) (Richardson, J., concurring and dissenting), *rev'd* 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988).

121. *See generally* testimony of J. Robert Hunter, President, National Insurance Consumer Organization Before the Subcommittee on Business, Trade and Tourism of the Senate Committee on Commerce, Science and Transportation, December 3, 1985. *The Economist* (June 6, 1987). In response to the claim of insurance companies that jury awards are escalating to abnormal heights, causing a crisis, Mr. J. Robert Hunter states: "The crisis is within the insurance industry, not in the courts."

damages in bad faith claims. The tribunal could work in conjunction with the Department of Insurance and enforce the regulations promulgated by the Department with respect to unfair settlement practices. Alternatively, the statutes could provide individuals with a private right of action to be heard only through an organization such as the American Arbitration Association.<sup>122</sup> Any decision by the arbitration panel would be binding upon the parties. Each party in the arbitration would be allowed to choose one or two arbitrators, and those arbitrators would be required to choose from a list of "neutral" arbitrators.

Arbitration as an alternative to the traditional judicial dispute resolution system has been hailed as a faster, cheaper, and fairer method of resolving disputes.<sup>123</sup> The arbitration method will insure that both parties' interests are fairly represented. The insurers need not be concerned with facing a jury whose sympathies lie with the injured party; while the injured party will have his "day in court" and an opportunity to recover actual damages caused as a result of the improper conduct of insurers.

*Deborah F. Sanders*

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122. *See generally* Dispute Management Today & Tomorrow, Annual Report of the American Arbitration Association 1986-1987. The American Arbitration Association (AAA) is an impartial agency created to resolve disputes outside the judicial arena. Parties usually agree to arbitrate through the AAA in contract provisions in the event a dispute arises between the parties. The arbitration is governed by the rules of the American Arbitration Association.

123. R. DE SEIFE, SOLVING DISPUTES THROUGH COMMERCIAL ARBITRATION § 101, at 4 (1987).